CHAPTER 2

Nominations

*July 29, 1987**

Mr. President, whenever a nomination to the Supreme Court is made, it invariably happens that both the nation and this body are treated to the "sounding brass" and "tinkling cymbals" of claims that the appointment process is a presidential prerogative.

Notwithstanding that the Constitution requires appointment with the advice and consent of the Senate, White House spokesmen and their sympathizers begin the familiar refrain that the Senate's role is confined to confirming the president's choice unless the nominee is "manifestly unfit" for the post. Throughout the history of the Republic, this contention has been heard in regard to both cabinet and judicial nominations.

Those holding this view maintain that the president should be free to select any person he desires for even the most elevated and sensitive position, especially if the president was elected to office by a substantial majority. Furthermore, they assert that a Senate inquiry into a nominee's fitness for office is limited to qualifications, while such other areas of obvious concern as his or her personal philosophy or ideology are off limits to Senate scrutiny. Proponents of this view also claim that the Senate is obligated to place its stamp of approval on a nominee so long as he or she can demonstrate the requisite minimum qualifications for the office in question.

All of these assertions have been made time out of memory but, unlike love, they do not become better or truer the second or third time around. Indeed, if anything, their repetition offends propriety, because they are transparent appeals to political expediency and opportunism and intended to deter the responsible exercise of the advice and consent function.

In recognition that the duty imposed on the president faithfully to execute the laws requires persons sympathetic to his programs, the Senate traditionally has given the president great leeway in choosing his policymaking subordinates, especially those in cabinet and subcabinet positions. The Senate has more or less uniformly followed this practice, as a matter of grace and in the spirit of cooperation, to ensure that the executive branch functions as a team in implementing and enforcing the laws.

What has been the fairly general practice with respect to the appointment of executive branch policymakers, however, has not applied to judicial nominations, and arguments to the contrary are at odds with the separation of powers doctrine, common sense, and history. The Constitution establishes a Su-

* Updated March 1989

preme Court and gives Congress power in its discretion to constitute inferior federal tribunals; nowhere in the blueprint of our government is it hinted that the high court or any other federal court is the president's court. Similarly, nothing in the Constitution suggests that either the justices or judges should be the president's men. In fact, the Constitution refutes this notion by granting federal judges lifetime tenure and making their compensation inviolable.

The Supreme Court not too long ago observed that "the principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." This principle appears especially in the clause dealing with appointments. "The Senate," the Court declared, "is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President." Nothing in the Court's remarks regarding appointment intimates that the Senate is intended to be a rubber stamp; indeed, as just stated, the Court specifically recognizes the Senate's "authority to refuse to confirm persons nominated to office by the President." The involvement of the Senate in the process was not motivated by "etiquette or protocol," but, according to the Court, reflects the fact that "[t]he men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny." [1]

Can a rubber stamp be "a vital check against tyranny"? The question answers itself. A "Patsy Senate"—about which Mary McGrory, a columnist, writes from time to time—is neither an effective bulwark for liberty nor true to itself or to the American people. If, in truth, the framers had intended the Senate simply to endorse the president's selection, the Senate could have been left out of the process altogether. Clearly, the men who met at Philadelphia two hundred years ago had in mind a more substantive role for the Senate.

Under the Articles of Confederation, the Congress made all nominations, but when the Constitution established a separate executive branch, it divided responsibility for nominations between the president and the Senate. Some delegates to the Constitutional Convention had wanted the Senate to make all nominations of principal officers, while others thought the president should have exclusive power to make appointments. Although the language of the Constitution was a compromise between these positions, those supporting a strong executive felt the provision clearly favored the president.

Writing in *The Federalist*, No. 66, Alexander Hamilton argued that "it will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, of the president." [2]

In common with many provisions of the Constitution, the clause which provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" is the result of a compromise between opposing views. One faction was afraid that giving the president the exclusive power of appointment would eventually lead to monarchy. These delegates believed not only that Senate involvement would reduce that danger but also that senators as a group might have information about a nominee not possessed by single individuals. John Rutledge of South Carolina, for example, was "by no means disposed to grant so great a power to any single person. The people will

think we are leaning too much towards Monarchy." Charles Pinckney thought that the "executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust." [3]

Convention proponents of a strong executive felt that the president would be better qualified and more responsible in making appointments than the members of the national legislature. Supporters of an exclusive presidential appointments power saw no danger that it would lead to monarchy or despotism. Instead, they contended that appointments by legislative bodies have generally resulted from cabals, personal regard, and other considerations unrelated to qualifications. Persuaded that the power to nominate was for all practical purposes the power to appoint, the members of this group agreed to the compromise by which the president was given the power to nominate, with Senate approval required before an appointment could be made. Later, in *The Federalist*, No. 76, Hamilton explained that "every advantage to be expected from [the power of appointment] would in substance be derived from the power of *nomination*. . . . There can, in this view, be no difference between nominating and appointing." [4]

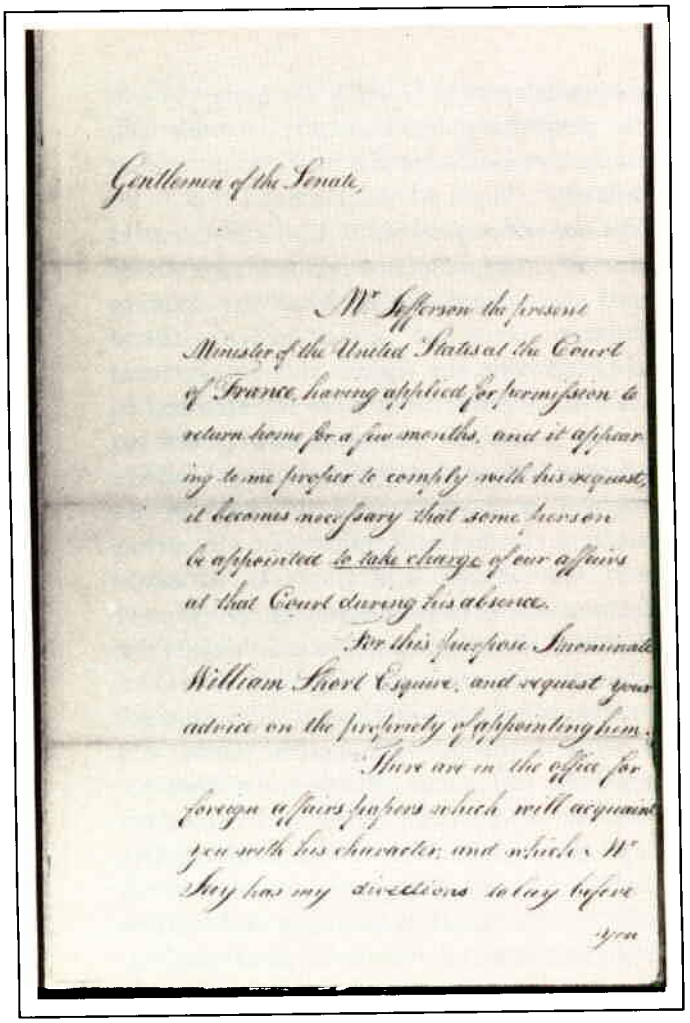
Although many of his views have stood the test of time, Hamilton's observation that a nomination is tantamount to appointment has not been vindicated. The role the Senate has actually played in giving its advice and consent has not been a mere passive review of the qualifications of the persons nominated by the president, as Hamilton had expected.

Hamilton, however, was convinced that Senate confirmation would be a welcome check on the president. He believed it "would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." [5]

Although the debates at Philadelphia and in the state ratifying conventions leave unresolved such questions as what the framers may have meant by "advice," there is little doubt regarding the significance of the term "consent." Clearly, the framers intended to give the president the exclusive power to nominate. Just as clear is the fact that Senate "approval" was necessary in order for an appointment to become effective. In other words, the Senate was given an absolute negative. Thus, while senators could not choose an officeholder, they could defeat the president's choice and oblige him to make one or more others until senators were satisfied with the nominee's qualifications. Although the oft-stated phrase "qualified for office" is used in the sense of fitness for office, it is not limited to technical competence but extends to general suitability. A candidate's personal philosophy and ideology are, therefore, relevant considerations.

Over the past two hundred years, many a battle has been fought between the White House and the Senate over nominations. Although most nominations are approved, the Senate has more than once flexed its political muscles to reject a presidential nominee—including the rejection or withdrawal of fifteen cabinet nominations and twenty-six Supreme Court nominations. Confirmation power is one of the major constitutional provisions that separates the Senate from the House. It has been the subject of numerous articles, books, novels, and even motion pictures.

Indeed, as early as Henry IV (1399–1413), English parliaments effectively controlled the king's royal council and household. Several officials of Henry IV's household were dismissed at the insistence of the Commons.



Gentlemen of the Senate,

Mr Jefferson the present Minister of the United States at the Court of France, having applied for permission to return home for a few months, and it appearing to me proper to comply with his request, it becomes necessary that some person be appointed to take charge of our affairs at that Court during his absence.

For this purpose I nominate William Short Esquire, and request your advice on the propriety of appointing him.

There are in the office for foreign affairs papers which will acquaint you with his character, and which Mr Jay has my directions to lay before you

William Short was the first presidential nominee.
National Archives

Both the household officials and the members of "the great and continual council" were named in Parliament. For a time, Parliament almost completely controlled the king's council—the equivalent of today's American cabinet. Parliament lost some of its control over the council during the reign of Henry V (1413–1422), and especially under the powerful Edward IV (1461–1483), when Parliament had no control over the council's composition. With few exceptions, it would be over two hundred years before the modern cabinet system made the royal ministers responsible to Parliament.[6]

President George Washington sent his first nomination to the Senate on June 16, 1789. It was not a cabinet nomination but, instead, the appointment of William Short to become minister to the court of France. He was to take the place of Thomas Jefferson, then returning to the United States to become secretary of state. John Jay, who headed the Office of Foreign Affairs under the old Congress of the Confederation, and who was continuing to direct foreign policy until his successor arrived, carried this first appointment to the Senate chamber. The Senate deliberated for two days, taking into consideration both Short's qualifications and Washington's method of communication concerning nominations. On June 18, the Senate, voting by secret ballot, approved Short's appointment.[7]

The Senate appointed a special committee to consult with Washington about the form of presidential communications concerning executive business. There was considerable sentiment within the Senate that the president should appear personally in the chamber to seek advice and consent on treaties and nominations. Washington was rightly skeptical of this approach. He ruled out appearing in person for nominations, on the grounds that they were too numerous and would become too time consuming. Washington, however, did agree to meet with the Senate concerning treaties, although his first experience proved so disastrous that he and all future presidents abandoned the practice in favor of written communications. Only one chief executive strayed from this tradition. In 1921, Warren G. Harding, who was serving as a senator at the time of his election to the presidency, went directly from the inaugural platform to the Senate chamber to submit his cabinet nominations—a list which included several senators. Harding's ill-fated presidency, however, has never served as a model for his successors.

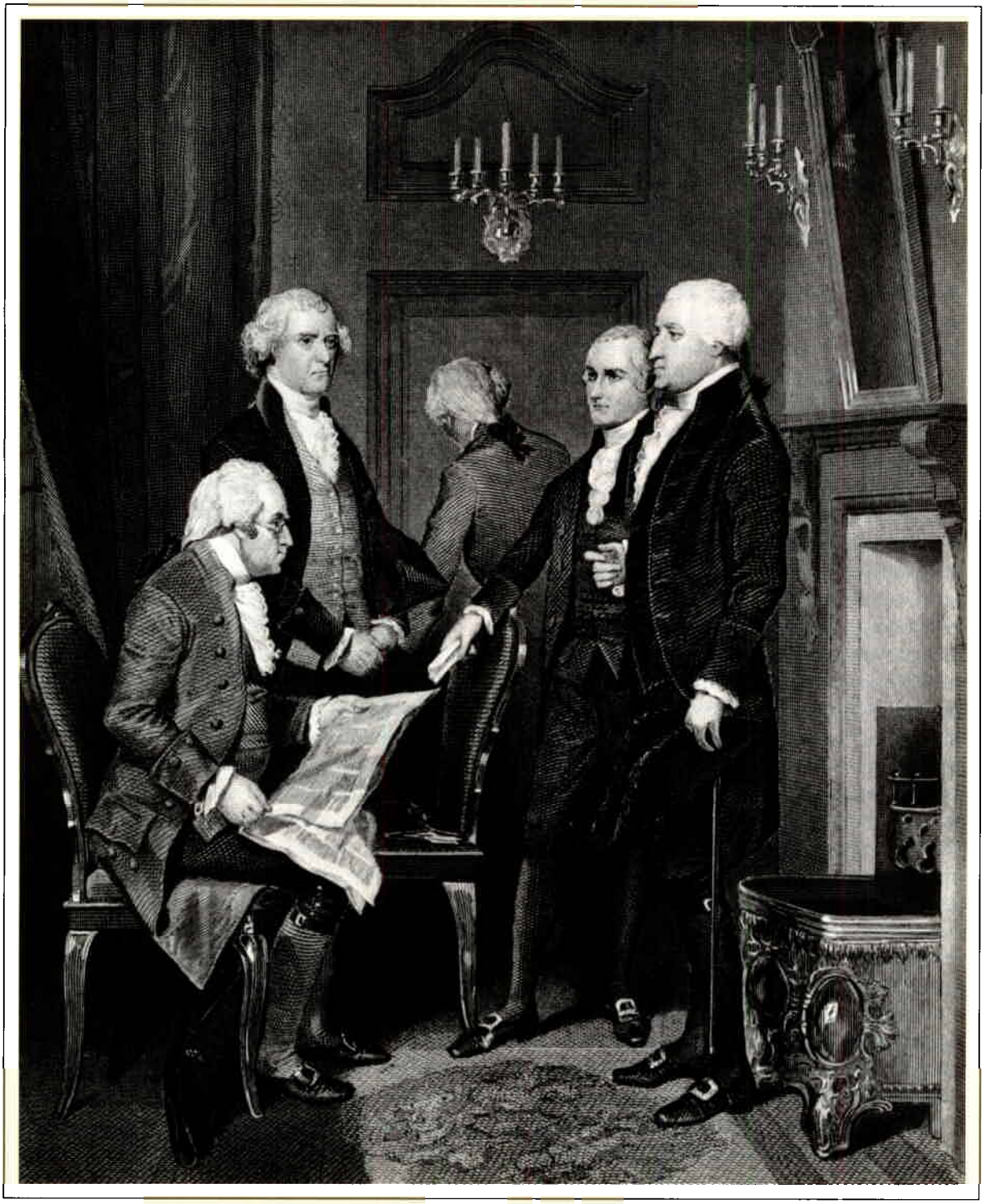
President Washington considered the appointment process "one of the most difficult parts of the duty of his office" and "the most irksome part of the executive trust." He fretted over pressures from unqualified office-seekers and turned away relatives who wanted federal jobs.

To one friend who wrote in support of a particular candidate, the president responded: "I am not George Washington, but President of the United States. As George Washington, I would do this man any kindness in my power; as President of the United States, I can do nothing." Later, Washington explained that he had aimed "to combine geographical situation and sometimes other considerations with abilities and fitness of *known* characters." The geographic balance of Washington's appointments can be seen in his selection of cabinet members from five states and Supreme Court members from seven states.[8]

Washington also worried about the precedents he was setting in relation to the Senate. In 1790, he conferred with James Madison, Thomas Jefferson, and John Jay about the propriety of consulting the Senate regarding geographic assignments for diplomatic representatives and the ranks they should hold. These able advisers agreed that the Senate had no constitutional right to interfere with either matter. Senators, they believed, were limited to the simple approval or disapproval of specific nominees. The senators themselves, however, were not so easily convinced. In 1791, when Washington nominated ministers to Paris, London, and The Hague, senators argued that they lacked enough evidence to determine whether it was in the best interest of the United States to place permanent emissaries at these capitals. Only after weeks of delay did Washington's nominees win a narrow approval.[9]

Another issue needing resolution was how senators would cast their votes for nominees. Those favorable to the administration tended to prefer voice votes; those suspicious of the administration—notably Senator William Maclay of Pennsylvania—preferred secret ballots to prevent undue presidential influence. When the Senate considered its first nomination, that of William Short, it voted by secret ballot. This practice raised considerable criticism from those who feared cabals and too much Senate control over nominations. On August 3, 1789, when Washington sent a long list of nominations for collectors, naval officers, and surveyors for the ports, the senators once more debated the proper procedure. Again, they decided to vote by secret ballot but warned that "it should not be considered as a precedent." Washington himself preferred a voice vote, and, on August 21, the Senate adopted the recommendation of its special committee "that all questions [on nominations] shall be put by the President of the Senate, either in the presence or absence of the President of the United States; and the Senators shall signify their assent or dissent, by answering viva voce ay, or no." And so we continue to vote, two centuries later.[10]

It is important to remember that, even though the senators cast voice votes rather than secret ballots, they continued to meet entirely in secret session. Only the briefest minutes of executive sessions were published, in a separate journal, well after the fact. Even after 1795, when the Senate permanently opened its doors and allowed visitors to observe legislative business, it closed its galleries for all executive business. Until 1929, the Senate routinely debated nominations in closed session. Senators believed that this arrangement enabled them to discuss an individual's merits more freely, while also protecting nominees from unnecessary public embarrassment. Although these were noble purposes, they simply did not work all that well. News from secret sessions leaked



George Washington, *far right*, chose as members of his first cabinet, *left to right*, Henry Knox, Thomas Jefferson, Edmund Randolph, and Alexander Hamilton. *Library of Congress*

out regularly during the first 140 years, causing the Senate no end of anguish. Secrecy also seemed to violate a key principle of a democratic republic: the right of the governed to know what their leaders were doing. Speaking for the public, the press waged a steady campaign against this secrecy until the doors to executive sessions at last swung open.[11]

Mr. President, there were not a great many federal appointments to be made in the early years of our republic, because the federal government was so small. In addition to cabinet secretaries and federal judges, there were diplomats, military officers, customs officers, and postmasters. But their numbers were minuscule by current standards. At the same time, there was no civil service system. All federal posts, no matter how small, were patronage positions, known to politicians as the "spoils of office." It was William L. Marcy, who served in the Senate from 1831 to 1833, who coined the slogan, "To the victor belongs the spoils." Much of a president's power rested in his ability to reward his supporters with federal appointments, but, as all presidents quickly discovered, patronage was both a blessing and a curse. From a twentieth-century perspective, it is amazing to read how much time eighteenth and nineteenth-century presidents spent listening to the pleas of officeseekers. Nor were United States senators immune to their entreaties.

Many early senators willingly submitted to President Washington the names of candidates for federal appointment. Quite often, senatorial intervention helped the candidate's chances, but Washington was not always swayed by congressional appeals. In 1794, House leader James Madison and Senator James Monroe three times appealed to Washington to appoint Aaron Burr as minister to France. But Washington refused to nominate the quixotic Burr. "I will appoint you, Mr. Madison, or you, Mr. Monroe," Washington responded apologetically. And, in fact, he did eventually send Monroe as minister to France.[12]

From the very beginning, the Senate insisted upon the practice that we commonly refer to as "senatorial courtesy." That is, the Senate generally will not confirm a candidate for a federal office within a state who does not have the support of his home state senators. This practice appears to date back to 1789, when President Washington nominated Benjamin Fishbourn to be naval officer in charge of the port of Savannah, Georgia. When Georgia Senator James Gunn opposed Fishbourn, the Senate rejected him. Washington conceded defeat and nominated a candidate acceptable to Senator Gunn.[13]

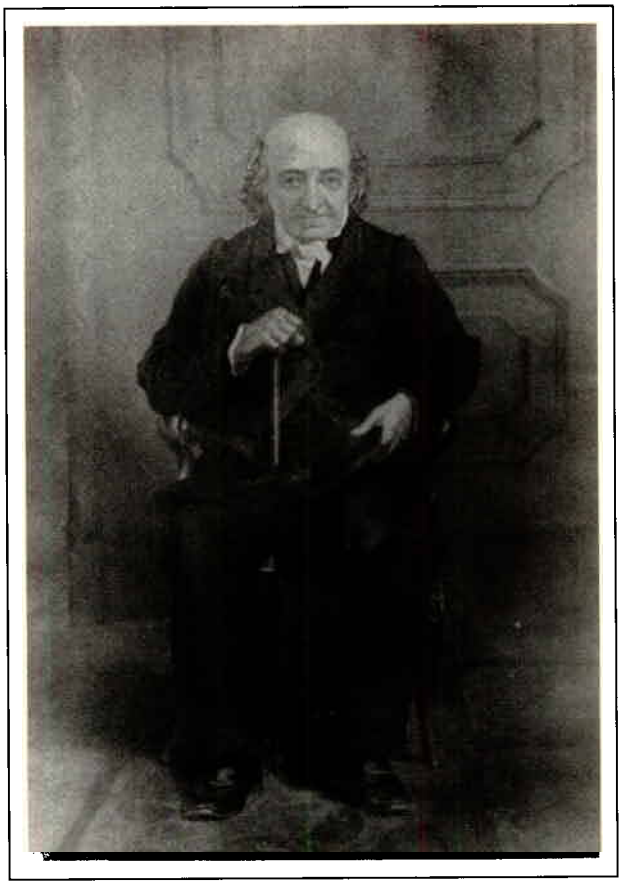
Senatorial courtesy grew even more deep-rooted during John Adams' presidential administration. Adams lacked Washington's national prestige and was even less able to withstand congressional pressures on nominations. He also faced the development of party organizations and, therefore, of organized opposition within the Senate. Although Adams made far fewer appointments than Washington, he had more of them rejected in the Senate. As Adams' weakness became more apparent, senators grasped for patronage power themselves. When one of Adams' own relatives recommended a nephew for appointment as a federal judge, the president responded, "If I were to nominate him without previous recommendations from the senators and representatives from your State, the Senate would probably negative him."[14]

Thomas Jefferson was a shrewder and more successful political leader than John Adams, but, within his first month as president, Jefferson complained that "nothing presents such difficulties of administration as offices." By the end of his presidency, Jefferson had concluded that the appointment

power was a "dreadful burden" which oppresses a president. Jefferson was faced not only with the problem of appointing deserving Republicans (as his party was then known), but also that of removing Federalist officeholders. During the months after President Adams' defeat, Federalists had tried to pack as many offices as possible with their supporters. One of these last-minute appointees was William Marbury, scheduled to become a justice of the peace in Washington. When incoming Secretary of State James Madison found Marbury's commission still on his desk, he refused to deliver it. Marbury's suit set up the landmark case of *Marbury* v. *Madison*, in which the Supreme Court claimed the right to declare acts passed by Congress unconstitutional.[15]

Jefferson enjoyed majorities in the Senate throughout his term and had little trouble winning confirmation of his nominees. Ironically, however, Jefferson suffered the embarrassing rejection of his last nomination, that of William Short to be minister to Russia. This was the same William Short who was the first person George Washington had nominated in 1789. It does not appear that the Senate rejected Short personally or meant to rebuke Jefferson politically. Instead, senators were registering their displeasure over the establishment of permanent diplomatic posts in so many countries.

Jefferson, like Washington, was followed by a weaker president. James Madison began his term by losing a battle with the Senate over his desire to appoint Treasury Secretary Albert Gallatin as secretary of state. Strong opposition to Gallatin, spearheaded in part by Senator Samuel Smith of Maryland, led Madison reluctantly to nominate Smith's brother, Robert, as secretary of state. This proved to be a poor choice—one which weakened the administration in the difficult years immediately prior to the War of 1812. Later, when Madison gave Gallatin a leave of absence from the Treasury Department and sent him to Europe to help negotiate peace with Great Britain, the Senate adopted a resolution protesting that the duties of secretary of the treasury and diplomatic envoy were incompatible. The Senate appointed a special committee to confer with the president on the matter, but Madison viewed this as an infringement upon presidential authority. In a special message to the Senate, he protested that "the appointment of a committee of the Senate to confer immediately with the Executive himself, appears to lose sight of the coordinate relation between the Executive and the Senate, which the constitution has established, and which ought therefore to be maintained." When the committee members



Opposition from some senators prevented President Madison from nominating Albert Gallatin as secretary of state. *Library of Congress*

persisted, Madison gave them a chilly reception and refused to discuss the Gallatin appointment.[16]

There is also evidence that the Senate voted to reject one of President Madison's cabinet nominations but then rescinded its vote to allow the president to save face. On March 1, 1815, President Madison nominated, as secretary of war, Henry Dearborn, who had previously held that post during the administration of Thomas Jefferson. Dearborn's abysmal record as a general during the recent war with Great Britain, however, had earned him so many opponents in the Senate that, on March 2, the president withdrew his name. In a letter to Dearborn, dated March 4, 1815, President Madison explained that he had first thought that the Senate would welcome the nomination, stating:

> Contrary to these confident expectations, an opposition was disclosed in an extent, which determined me to withdraw the nomination. But before the Message arrived, the Senate very unexpectedly had taken up the subject and proceeded to a decision. They promptly however relaxed so far as to erase the proceeding from their Journal, and in that mode to give effect to the withdrawal.[17]

Mr. President, since the handwritten copy of the *Senate Executive Journal* at the National Archives gives no indication of any vote against the Dearborn nomination, we can assume the executive clerk that day did a thorough job of erasing the proceedings. I am unaware of any other similar tampering with the *Journal*, although, in 1837, the Senate did "expunge" its censure resolution of President Andrew Jackson. Nevertheless, I believe that we can trust James Madison's word that the Senate did indeed vote to reject the nomination of Henry Dearborn, making that the first overt rejection of a cabinet nominee in the history of this body.

During the one-party Era of Good Feelings, from 1817 to 1824, general harmony existed between the president and the Senate over nominations, but then open warfare broke out during the presidency of Andrew Jackson, which began in 1829. General Jackson came to Washington with a determination to "kick the rascals out" and to place his own supporters in federal posts. Foremost among these supporters were newspaper editors, who comprised a third of Jackson's appointments during his first session of Congress. Of course, as Jackson enthusiasts, these editors had offended Jackson's opponents in the Senate, who fought to deny them office.

Perhaps the most memorable Senate rejection of a Jackson appointee occurred in 1831. Jackson had nominated Senator Martin Van Buren, a New York Democrat, to serve as minister to Great Britain. But the highly partisan Van Buren had incurred the enmity not only of the opposition party, but also of Vice President John C. Calhoun. When the vote was taken, it resulted in a tie, and when the vice president cast the tie-breaking vote, he rejected his own president's nominee. Afterwards, Calhoun gloated to Senator Thomas Hart Benton: "It will kill him, sir, kill him dead. He will never kick, sir, never kick." Benton doubted that and prophesied, "You have broken a Minister and elected a vice president." Indeed, that is exactly what happened. When Jackson heard of the vote, he swore, "By the Eternal! I'll smash them!" In his campaign for a second term, Jackson dropped Calhoun and ran with Van Buren. And when Jackson retired as president, Van Buren succeeded him to the White House.[18]

Jackson's war with the Senate over the Bank of the United States led to the first officially recorded Senate rejection of a cabinet secretary. On June 24, 1834, the Senate voted 18 to 28 to reject Jackson's recess appointment of Attorney General Roger B. Taney as secretary of the treasury. Whigs in the Senate were offended by Taney's action—

In one evening, President John Tyler, *left*, nominated Caleb Cushing, *right*, three times to be secretary of the treasury, but the Senate rejected him each time. *National Portrait Gallery and Library of Congress*

taken at the president's request—of removing federal funds from the Bank of the United States. By refusing to confirm Taney they were in fact rejecting Jackson. But the action neither changed Jackson's antibank policies nor damaged Taney's career. He went on to become chief justice of the United States in 1836, as Jackson's appointee, and served in that position until his death in 1864. Although battered by the Senate, Jackson felt he had emerged victorious. As he prepared to leave office, Jackson commented to a friend how much he looked forward to "the glorious scene of Mr. Van Buren, once rejected by the Senate, sworn into office [as President] by Chief Justice Taney, who also [had been] rejected by the factious Senate." [19]

Despite Jackson's satisfaction, after he left office, the Senate asserted its power over appointments and held the upper hand over the executive branch for the remainder of the nineteenth century. An example is the experience of John Tyler, the first vice president to become president on the death of the incumbent. Early in his administration, Tyler broke with the Whig majority in the Senate, which thereafter frustrated his efforts to appoint his own supporters to office. Nothing in the Senate's history has matched the spectacle that occurred on March 3, 1843, the last day of the Senate's session, when Tyler came to the Capitol to sign legislation and to submit last-minute nominations.

Tyler nominated Caleb Cushing to be secretary of the treasury not once but three times that night, and each time the Senate rejected Cushing by an even larger margin than before, the votes being, as recorded in the *Senate Executive Journal*, 19 to 27, 10 to 27, and 2 to 29. Three times, Tyler nominated Henry A. Wise to be minister to France, and

Wise, too, was thrice rejected. Senator Thomas Hart Benton reported that "nominations and rejections flew backwards and forwards as in a game of shuttlecock." In all, the Senate turned down four of Tyler's cabinet nominees—in addition to Cushing, David Henshaw as secretary of the navy, James M. Porter as secretary of war, and James S. Green as secretary of the treasury—and four of his nominees to the Supreme Court—John C. Spencer, Reuben H. Walworth, Edward King, and John M. Read—a record of rejection unmatched by any other president.[20]

When Democrat James K. Polk succeeded Tyler in the White House in 1845, he experienced tremendous pressure from members of Congress to follow their recommendations for appointments. "The passion for office among members of Congress is very great, if not absolutely disreputable, and greatly embarrasses the operation of the government. They create offices by their own votes and then seek to fill them themselves," Polk complained. He found his anterooms filled with officeseekers bearing signed letters of recommendation from congressmen. In one instance, Polk appointed a man recommended by a senator from Missouri to become surveyor of the port of St. Louis, only to have the individual rejected because of the opposition of the very senator who recommended him. When Polk pointed out this inconsistency, the senator replied, "Well, we are obliged to recommend our constituents when they apply to us."[21]

Mr. President, this incident calls to mind Representative James Buffin(g)ton, a Massachusetts Republican, who served in the House from 1855 to 1863 and 1869 to 1875. If we examine the 1971 edition of the *Biographical Directory of the American Congress*, we will find parentheses around the "g" in his name. The story goes that Buffin(g)ton could never say "no" to a constituent asking for federal appointment, no matter how incompetent or

Representative James Buffin(g)ton invented an ingenious way to indicate whether he genuinely supported the constituents he recommended for federal office. *Library of Congress*

inappropriate the individual might be. So the congressman worked out a system that became well known among Washington clerks. When he signed letters of recommendation with a "g" in his name, that signaled that he considered the person worthy of appointment; when he signed without a "g," the recommendation should not be taken seriously. Either way, the constituent felt that his congressman had loyally supported his claim. Needless to say, Representative Buffin(g)ton was regularly reelected.[22]

President Abraham Lincoln had his own system of code for indicating the degree of his support for a given officeseeker. According to historian Allan G. Bogue, the types of comments he noted on an applicant's letter could be arranged in ascending order of priority, as follows:

I wish this paper called to my attention, when, if ever, the vacancy mentioned occurs.

I know James A. Briggs, and believe him to be an excellent man.

Let it be fairly considered.

As the appointment of a consul is desired by Mr. Hickman, who is much of a man, and does not trouble us much, I wish it to be made if it is within reasonable possibility.

I would like for these gentlemen to be obliged as soon as it can consistently be done.

I desire that [Congressman —] be obliged.

I shall be personally obliged if you will make the appointment.

I would like for [Mr. Nixon] to be obliged.

Oblige [Mr. Rollins] if you consistently can [consistent, that is, with propriety and the requests of others].

If consistent, let the appointment be made.

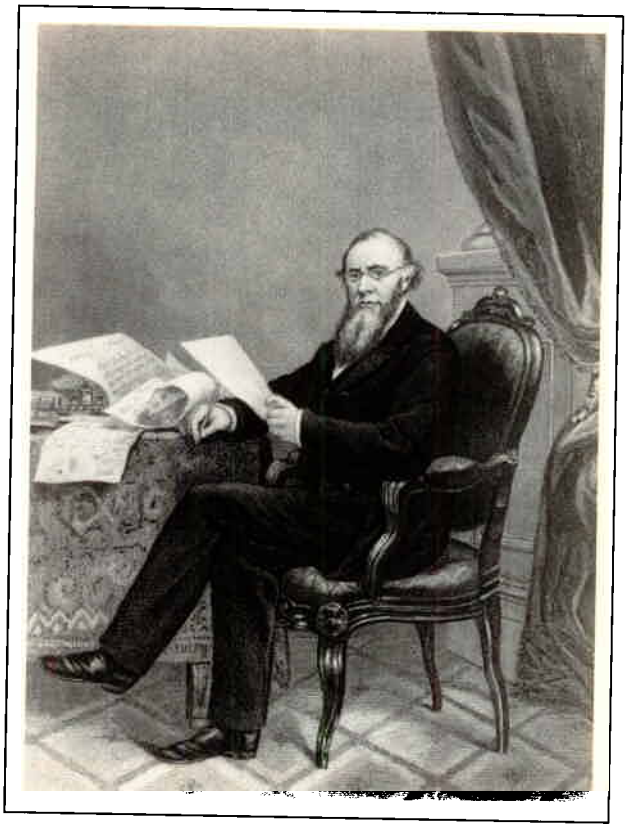
If at all consistent, let it be done.

Mr. Rice must be obliged in this.

Let the appointment be made [or] Let it be done.

"Only in the last three cases," Bogue observed, "did the president commit himself to action in the applicant's behalf." [23]

The patronage system worked well so long as presidents were in basic harmony with the majority in the Senate, but it caused rough times when presidents were at odds with the Senate. Recall the case of Andrew Johnson, who followed Abraham Lincoln to the presidency only to break with the Radical Republicans in Congress. A struggle over their sharply divergent goals for the reconstruction of the former Confederate states took on monumental proportions. It affected not only the president's appointments but also his efforts to remove certain individuals from office. Although the Constitution spelled out the procedures for nomination and confirmation of federal appointees, it left vague the question of how they should be removed. Did the president have unrestricted right to remove a person who had been confirmed by the Senate, or did he need the Senate's approval? Fearing that President Johnson would remove all officeholders sympathetic to Radical Reconstruction, Congress in 1867 enacted the Tenure of Office Act over Johnson's veto.



The firing of Secretary of War Edwin Stanton precipitated President Andrew Johnson's impeachment.
Library of Congress

This act provided that every civil officer confirmed by the Senate should hold office until a successor had been nominated *and confirmed.* It was Johnson's firing of Secretary of War Edwin Stanton, in violation of the Tenure of Office Act, that led to his impeachment. Significantly, the Tenure of Office Act remained the law for over fifty years, much to the discomfort of presidents from both parties. Finally, in 1926, the Supreme Court ruled the act unconstitutional, in the case of *Myers* v. *U.S.* This decision left unquestioned the power of presidents to dismiss all federal executive appointees except those with specific fixed terms, such as members of the regulatory commissions, whose independence would be compromised if they could be removed by the president for political or policy reasons.[24]

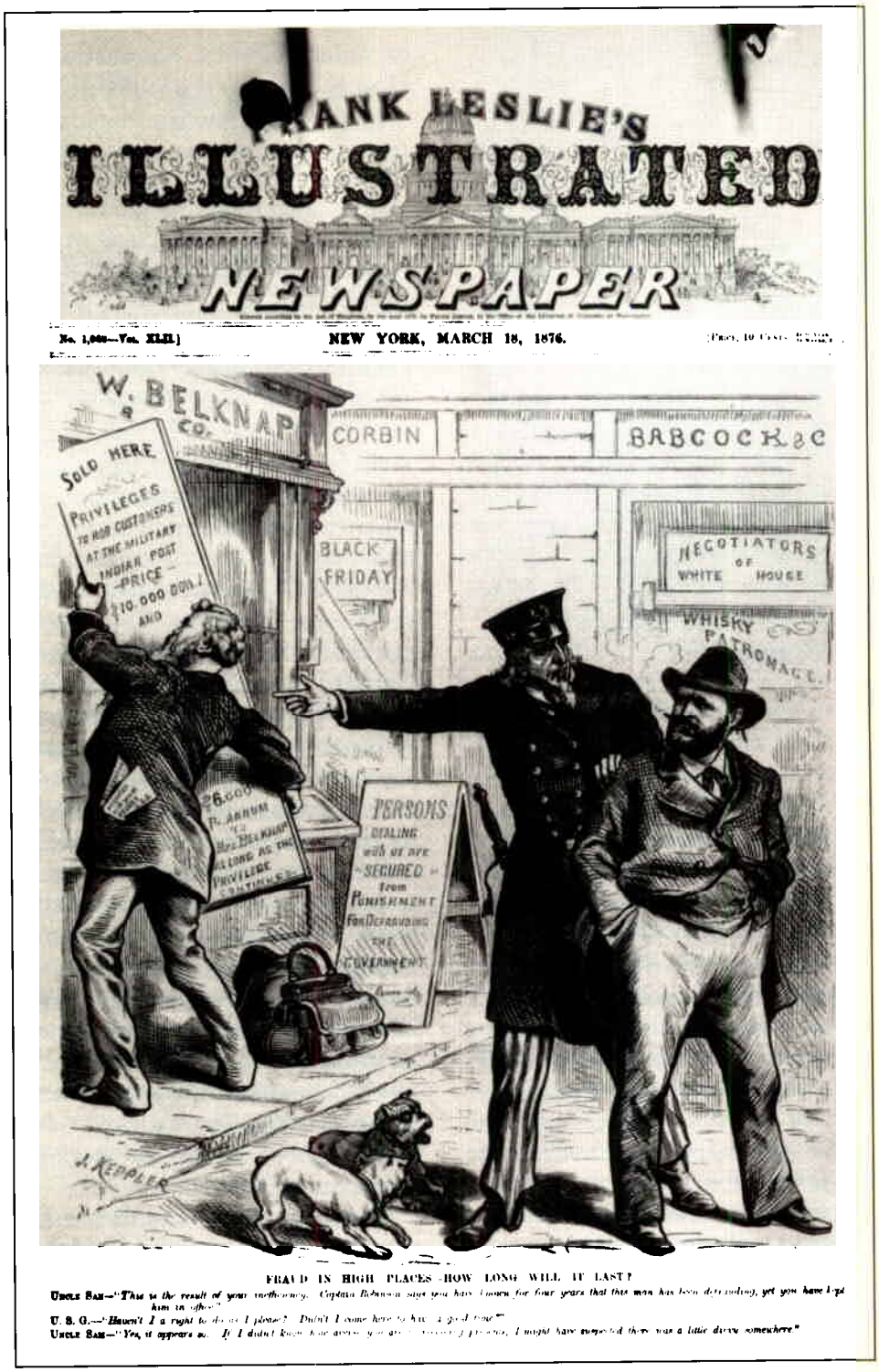
Henry Stanbery's devotion to his chief led him to sacrifice his position as attorney general in order to act as Andrew Johnson's counsel in the trial of the impeachment. Johnson's renomination of Stanbery for his old job following the trial was negatived by the Senate on June 2, 1868, in an atmosphere of bitterness and recrimination.

Andrew Johnson's successor, General U.S. Grant, should have had an easy time with nominations. He was a Republican, in sympathy with the Republican majority in the Senate; he was a hero with great popular support; and he came as a relief after the tense years of struggling with Johnson. But Grant was a political novice who had much to learn about the ways of Washington. The new president never bothered to consult with fellow party members in Congress about his cabinet appointments. The day after Grant's inauguration in 1869, the Senate received the president's cabinet nominees with some shock. It was a relatively unknown and undistinguished group of names. The most prominent individual on the list was Alexander T. Stewart, wealthy proprietor of the nation's largest department store, to be secretary of the treasury. But senators pointed out that the law prohibited anyone engaged in trade or commerce from serving as treasury secretary. Stewart refused to sell the business that bore his name, and the Senate would not accept his placing it in a blind trust. When faced with the prospect that the Senate would hold up the nomination in committee indefinitely, Grant reluctantly accepted Stewart's resignation.[25]

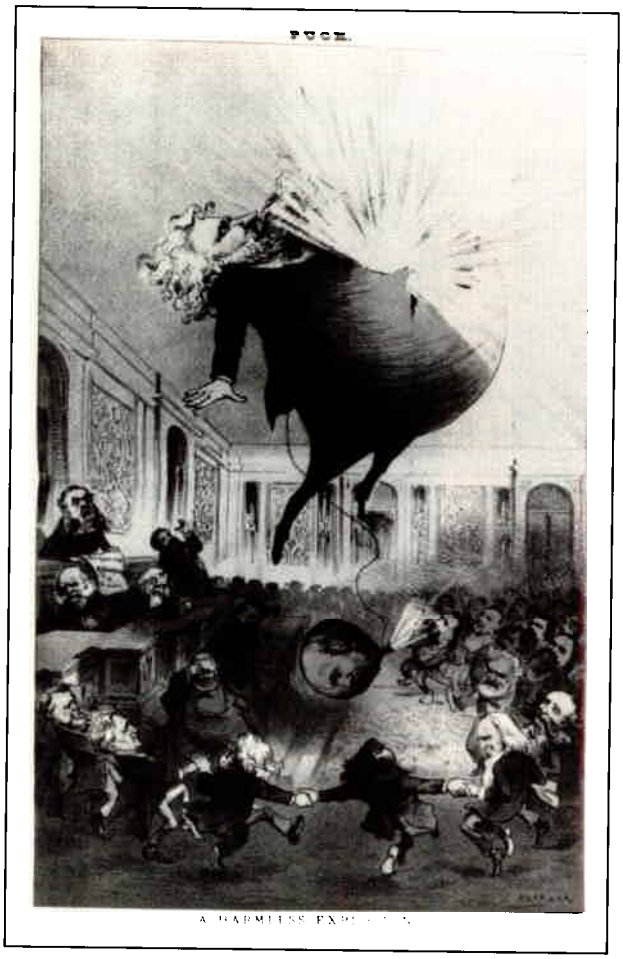
Further muddying the waters for Grant, his attorney general, Ebenezer Hoar, insisted that the president make judicial nominations without prior senatorial clearance, thus violating a venerable tradition. Hoar's choices of nominees were in fact quite excellent, but he made few friends in Congress for the administration. One can imagine the pleasure with which members of the Senate cast their votes to defeat Grant's nomination of Ebenezer Hoar to serve on the Supreme Court.[26]

In the late nineteenth century, patronage permitted several senators to become the undisputed political "bosses" of their home states. Memorable names on this list included Pennsylvania's Simon Cameron and Matthew Quay, New York's Tom Platt, Rhode Island's Nelson Aldrich, and West Virginia's Stephen Elkins. Those who wanted a federal appointment knew they must obtain the blessings of these powerful senators, and presidents dared not cross them unless they were prepared for a brutal political fight. The greatest of these battles occurred in 1881, when new President James A. Garfield decided to take on one of the most powerful members of his own party, New York Senator Roscoe Conkling. To the patronage-rich post of collector of the port of New York, Garfield nominated William Robertson, a former Conkling lieutenant who had broken ranks to support Garfield's nomination for the presidency. This audacious nomination set off a power struggle that ended tragically in Conkling's defeat and Garfield's death. Offended by the president's breach of senatorial courtesy, Senator Conkling resigned from the Senate and returned to Albany, hoping to persuade the state legislature to demonstrate its support by reelecting him. The legislature, however, rebelled and elected someone else. Meanwhile, in Washington, a demented officeseeker shot and fatally wounded President Garfield in the name of Conkling's "stalwart" faction of the Republican party.[27]

Garfield's death shocked the nation and sobered political leaders in both parties. For too long, they had allowed the patronage system to grow to scandalous proportions. Presidents had been hounded and now assassinated by officeseekers. At last, Congress accepted the need for a professional civil



Cartoonist Joseph Keppler pictured official corruption in this caricature of, *left to right*, Senator Conkling, Uncle Sam, and President Grant. *Frank Leslie's Illustrated Newspaper, March 18, 1876*

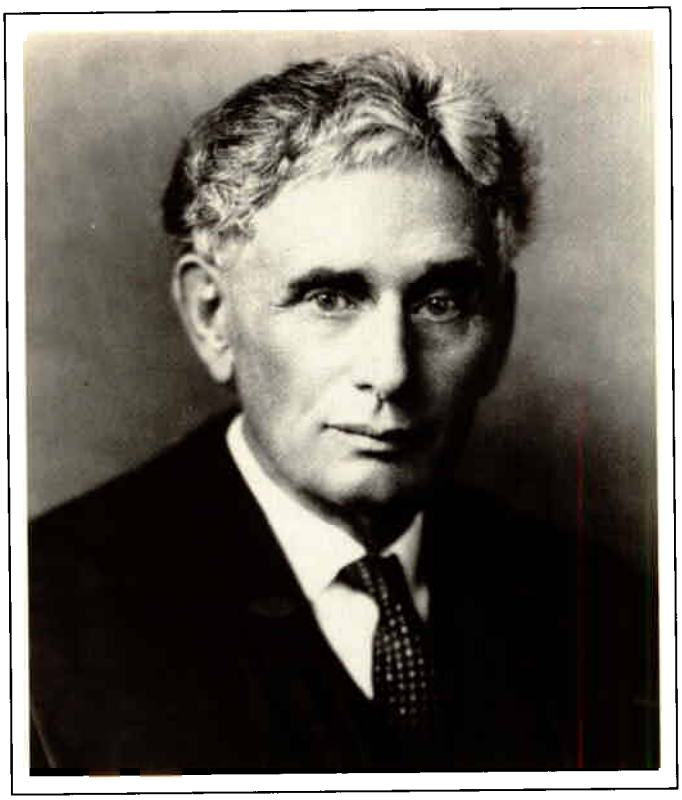


Senator Conkling's resignation from the Senate failed to produce the dramatic impact he expected.
Keppler/Puck, May 25, 1881

service. The Civil Service Act of 1883, known as the Pendleton Act because it was sponsored by Ohio Democratic Senator George Pendleton, removed a large segment of lower-level bureaucratic positions from the ranks of patronage appointments. A period of relative peace between the executive and the legislature followed, marred only by the actions of the Republican Senate to prevent Democratic President Grover Cleveland from making Supreme Court nominations toward the end of his second term.[28]

The next major battle, also involving a Democratic president's Supreme Court nomination, occurred in 1916 when Woodrow Wilson appointed Louis D. Brandeis as the first Jewish member of the Court. A brilliant Boston lawyer, Brandeis at that time had acquired a national reputation as the "People's Lawyer." A committed opponent of monopoly and a defender of consumers, he was the Ralph Nader of his day and equally controversial. Brandeis had advised Wilson during his campaign for the presidency and had helped to shape his "New Freedom" economic program. It should not have come as a surprise, therefore, that Wilson would nominate Brandeis to the Court when a vacancy occurred in 1916. Brandeis' many enemies, however, including conservative politicians and business leaders, denounced him as "ridiculously unfit" to serve as a judge. One who spoke out strongly was former President William Howard Taft—defeated by Wilson in 1912—who described Brandeis as "a muckraker, an emotionalist for his own purposes, a socialist."[29]

When the Judiciary Committee held public hearings, a string of witnesses denounced Brandeis. Fifty-five prominent Bostonians, led by Harvard President A. Lawrence Lowell, sent a petition to the committee, saying, "We do not believe that Mr. Brandeis has the judicial temperament and capacity which should be required in a judge of the Supreme Court." Quite clearly, anti-progressive and anti-Semitic undertones could be heard in these protests. To his credit, President Wilson stood firmly behind his nominee—a particularly notable action, since Wilson was running for reelection that year. In a letter to the Judiciary Committee, the president argued that the charges against Brandeis "threw a great deal more light upon the character and motives" of those who made them than on their intended target. "He is a friend of all just men and a lover of the right," the president wrote. "I knew from direct personal knowledge of the man what I



Woodrow Wilson called Louis Brandeis "a friend of all just men and a lover of the right."
Library of Congress

was doing when I named him for the highest and most responsible tribunal of the Nation." On June 1, 1916, the Senate voted 47 to 22 to confirm Louis D. Brandeis. He went on to become one of the greatest and most influential justices of that Court, serving until 1939 and thoroughly justifying Woodrow Wilson's decision.[30]

In the twentieth century, the Senate has rejected very few presidential nominations to either the Supreme Court or the cabinet. Only seven Supreme Court nominees have been withdrawn or have not been confirmed: President Herbert Hoover's choice of John J. Parker, President Lyndon Johnson's choices of Abe Fortas and Homer Thornberry, President Richard Nixon's choices of Clement Haynsworth and G. Harrold Carswell, and President Ronald Reagan's choices of Robert Bork and Douglas Ginsburg.

Parker, a North Carolina Republican, was accused of making antilabor and racist rulings, although his later record disproved those allegations. Fortas was sitting on the Court when President Johnson elevated him to chief justice and nominated Homer Thornberry to fill the vacancy. Since Johnson was not running for reelection, some members of Congress objected to a lame-duck president filling such important posts. Questions arose over Fortas' personal ethics, which caused him to resign; Thornberry's nomination was never acted upon.

Johnson's successor had equal difficulty in filling Supreme Court vacancies. Having been elected on the strength of his so-called "southern strategy," Nixon turned to lower-court judges from the South, picking Clement Haynsworth of South Carolina. Liberal senators mounted a strong challenge to Haynsworth for his questionable financial dealings, but, after defeating Haynsworth, they were confronted with Nixon's next choice of Harrold Carswell of Florida. With hindsight, some members, including myself, considered that they would have been better off with Haynsworth, who was a distinguished jurist, while even Carswell's supporters admitted his mediocrity. President Nixon was furious over these rejections. "If the Senate attempts to substitute its judgment as to who should be appointed," Nixon wrote, "the traditional constitutional balance is in jeopardy and the duty of the President under the Constitution impaired." After suffering two embarrassing defeats, however, the president wisely chose to nominate an able candidate, Harry A. Blackmun, who was easily confirmed in 1970. Nineteen years later, Justice Blackmun continues to serve on the Court, demonstrating that those bitter nomination fights were worth the effort.[31]

On July 1, 1987, President Reagan nominated Court of Appeals Judge Robert Bork for a seat on the Supreme Court. Considering

Charles Warren, Lewis Strauss, and John Tower, *left to right*, have been the only three cabinet nominees rejected by the Senate in the twentieth century. *Library of Congress and U.S. Senate Historical Office*

that the Senate had previously confirmed three other conservative Reagan nominees for the Court, ideology was not so much the issue in Judge Bork's case. Rather, it was his perceived ideological inflexibility and intellectual aloofness that seemed to separate him from the very human elements of the issues that daily face the Court. Judge Bork's published opinions on civil rights and privacy particularly troubled many senators and contributed to his defeat. A motion in the Judiciary Committee to report his nomination favorably to the Senate was rejected by a vote of 5 to 9 on October 6, 1987. Later that day, a motion to report the nomination unfavorably carried by a vote of 9 to 5. On October 23, the full Senate voted 42 to 58 to reject Bork. Six days later, on October 29, President Reagan nominated—far too hastily as it turned out—another Court of Appeals judge, Douglas Ginsburg. Soon, however, reports surfaced in the news media about Judge Ginsburg's personal behavior, specifically his past use of marijuana, and, on November 7, 1987, the president withdrew his nomination.

Finally, the president nominated Judge Anthony Kennedy, who was easily confirmed and sits today upon the U.S. Supreme Court. Justice Kennedy is the 104th individual to serve on the Court.[32] Judge Ginsburg was the 26th person named to the court whose nomination was rejected, withdrawn, or not acted upon. Thus, some 20 percent of all Supreme Court nominees have not been confirmed. This strikingly large percentage speaks volumes about the Senate's attitude toward the independent status of the Supreme Court. By comparison, 541 individuals have served as cabinet secretaries, and only 15 have been rejected or withdrawn, less than 3 percent of the total. That is a remarkable difference.

Incidentally, the first Supreme Court had six members. The number was increased to nine in 1837 and to ten in 1863. In 1866, Congress was so bitter against President Andrew Johnson that it did not want him to have the privilege of making any appointments to the Court. When two vacancies occurred, Congress simply passed a law reducing the number of associate justices to seven. In 1869, the Court was again enlarged, and it has consisted of nine members ever since.

Only three cabinet nominations have been rejected since 1900. On March 10, 1925, the Senate turned down President Calvin Coolidge's candidate for attorney general,

Charles Warren. This was just after the well-publicized Teapot Dome investigation into government corruption, and progressive members of the Senate challenged Warren's connections with the "sugar trust." The vote was very close, and Warren lost only because Vice President Charles Dawes overslept that afternoon and did not get to the Capitol in time to cast the tie-breaking vote. Coolidge, fresh from an election victory at the polls, viewed the Senate's action as a challenge to his leadership and sent back the nomination, followed by a White House statement that the president would make a recess appointment of Warren if the Senate again rejected the nomination. This threat provoked a storm on Capitol Hill; the Judiciary Committee reported the nomination adversely and the Senate rejected it on March 16 by a vote of 39 to 46. Coolidge then abandoned his plan to give Warren a recess appointment and, on March 18, named John Sargent to the post.[33]

President Dwight D. Eisenhower suffered the humiliation of a cabinet-level defeat in 1959, when he nominated Admiral Lewis Strauss to serve as secretary of commerce. Admiral Strauss had previously served as chairman of the Atomic Energy Commission. Never a tactful man, he had alienated many senators, especially Senator Clinton Anderson of New Mexico. Anderson made it a personal quest to defeat Strauss' nomination and succeeded by a vote of 46 to 49.[34]

Most recently, on March 9, 1989, by a vote of 47 to 53, the Senate rejected the nomination of former Texas senator John G. Tower to be secretary of defense, following a party-line vote in the Armed Services Committee to report the nomination with an unfavorable recommendation. Opposition to the nominee was based on several concerns: a possible conflict of interest growing out of Tower's employment as a consultant to defense contractors after his service as an arms control negotiator; evidence bearing on a perceived pattern of excessive drinking in the not-far-distant past; and allegations and rumors of womanizing. All sides were in agreement that Tower, a former chairman of the Senate Armed Services Committee, was eminently qualified, regarding military and arms control matters, to be secretary of defense.

While the Tower nomination fight was a difficult experience both for members of the Senate and for the administration of President George Bush, it may have finally exploded some of the myths often perpetuated in the press. Although this occasion marked only the ninth time that a cabinet nominee has been formally rejected by a Senate vote and the first time that the Senate has rejected a former colleague for a cabinet office, three former senators—John J. Crittenden, George E. Badger, and George Henry Williams—had in the past been nominated but not confirmed as justices of the Supreme Court. Similarly, President Harry Truman's nomination of former Senator Monrad Wallgren as chairman of the National Security Resources Board had been tabled by the Senate Armed Services Committee. Clearly, former members are not excused from the Senate's scrutiny of nominations. Tower's rejection was also the first time that one of a new president's initial cabinet nominees was not confirmed—all other cases have occurred later in a presidential term. Again, the incident demonstrates that no president has the constitutional authority to "have his own team" without the consent of the Senate. While the Senate is willing to give the president far more leeway in choosing cabinet officers than in selecting Supreme Court nominees, it will not hesitate to reject a candidate it considers unfit.

Mr. President, I have concentrated here on cabinet and Supreme Court nominations and have not touched upon the thousands of

lower level nominations that presidents send to Capitol Hill every session. Committees routinely consider nominations, and not all are reported out or reported out favorably. Some have been postponed indefinitely, while others have simply disappeared into the far reaches of committee file rooms.

Pat Holt, who served as chief of staff of the Senate Foreign Relations Committee in the 1970's, recalled the way that committee handled the nomination of Graham Martin, whom President Gerald Ford nominated to an ambassadorial post. Martin was our last ambassador to Saigon, and many committee members had been unimpressed with his performance in the job. When the committee met in executive session to consider the nomination, it was clear that the members did not intend to confirm him. Since they did not wish to reject Martin outright, they suggested holding the nomination while the staff conducted further investigation. "Is that clear, Pat?" someone asked. Holt replied, "Yes, it's very clear, and just to make it clearer, I'm not sure how long it will take the staff to do this." Several senators said, "Oh, don't hurry," and Senator George McGovern added, "Suppose we say the Fourth of July, 1990." [35]

In general, the better track record that presidents have enjoyed in recent years indicates that they—or at least their staffs—have developed a deeper appreciation of the Senate's role in the confirmation process, as well as a bit more finesse in presenting their candidates. Not long ago, the *New York Times* published a profile of Tom Korologos, who helped shepherd Reagan administration appointees through various nomination hearings. Korologos described his role in educating nominees.

"You have to scare 'em a little bit," he explained. Before sending nominees to a committee hearing, Korologos put them through a mock hearing. "I fire the rottenest, most insulting questions in the world at them." He offered the following set of rules to all White House nominees:

> (1) Model yourself after a bridegroom at a wedding: Be on time, stay out of the way, and keep your mouth shut.
>
> (2) Between the day of nomination and the day of confirmation, give no speeches, write no letters, make no public appearances. Senators don't like to read about the grand plans of an unconfirmed nominee.
>
> (3) You may have been a brilliant victor in the corporate world or some other field of endeavor, but the Senate expects you to be suitably humble and deferential, not cocky.
>
> (4) There is no subject on earth that the Senate is not free to probe. Be ready with polite and persuasive answers.[36]

Mr. President, in my general overview of the past two hundred years of presidential-congressional relations regarding the appointment process, I have largely emphasized presidential problems and difficulties. I do not want to leave the impression that presidents are the only ones to suffer anguish over nominations. Certain nominations often place United States senators in very uncomfortable positions when they are forced to choose between their conscience and their president. A wrong decision, either way, can cause no end of trouble. In the Ninety-ninth Congress, we witnessed the fate of Senator Slade Gorton of Washington. Senator Gorton had been pressing the Reagan administration to nominate William Dwyer as a federal judge from his home state, but Dwyer was ideologically out of step with the White House. Then, the president nominated Daniel Manion to be a federal judge in Indiana. To win Senator Gorton's loyalty, White House lobbyists tied his vote on Manion to Dwyer's nomination. Senator Gorton swallowed hard and cast a vote that he might otherwise have cast differently. Manion was confirmed. Senator Gorton was defeated for reelection by voters

who reacted negatively to the whole arrangement. Subsequently, Dwyer was nominated and confirmed as a federal judge, and, in 1988, Senator Gorton was again elected to the Senate.

The Senate often finds itself in positions where it will draw criticism no matter what it does. If the Senate probes too long or too deeply into a nominee's past, it is accused of denying the president the assistance he needs when he needs it. If the Senate rushes through a nomination without adequate investigation, it is accused of providing "consent without advice" or being "half rubber, half stamp." [37]

From years of experience, I would say that we do the country a disservice by rushing any nomination, unless there is a clear record as to the nominee's integrity, capability, and qualifications, as well as an overriding need for speedy action. If serious character flaws or damaging information about a nominee's past are to be uncovered, better that they become public knowledge before the individual is confirmed rather than afterwards. That is a hard message to deliver to any president of any party, but it is a lesson that has been learned too frequently to be forgotten. "History," wrote the poet Byron in *Childe Harold*, "with all her volumes vast, hath but one page." We should do well, then, to look backward into the past where we shall find that due diligence by the Senate in fulfilling its "advice and consent" responsibility in the appointment process has been, in Hamilton's words, "an efficacious source of stability" in the government of the Republic. For, as he wrote in *The Federalist*, No. 76:

> The possibility of rejection [by the Senate] would be a strong motive to care in proposing. . . . [The president] would be both ashamed and afraid to bring forward . . . candidates who had no other merit, than that . . . of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.[38]

In sum, the Senate must continue seriously and painstakingly to perform its constitutional responsibility of rendering advice and consent on presidential nominations if we are to maintain the unique system of checks and balances that has brought our democratic form of government to its bicentennial.